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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 363

JUAN POSADAS, JR., AS COLLECTOR OF INTERNAL REVENUE, BEN F. WRIGHT, AS INSULAR AUDITOR, VICENTE CARMONA, AS INSULAR TREASURER, AND THE METROPOLITAN WATER DISTRICT, *Petitioners*,

vs.

THE CITY OF MANILA, *Respondent*.

BRIEF FOR PETITIONERS

WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate,

L. H. HEDRICK,
Major, Judge Advocate,

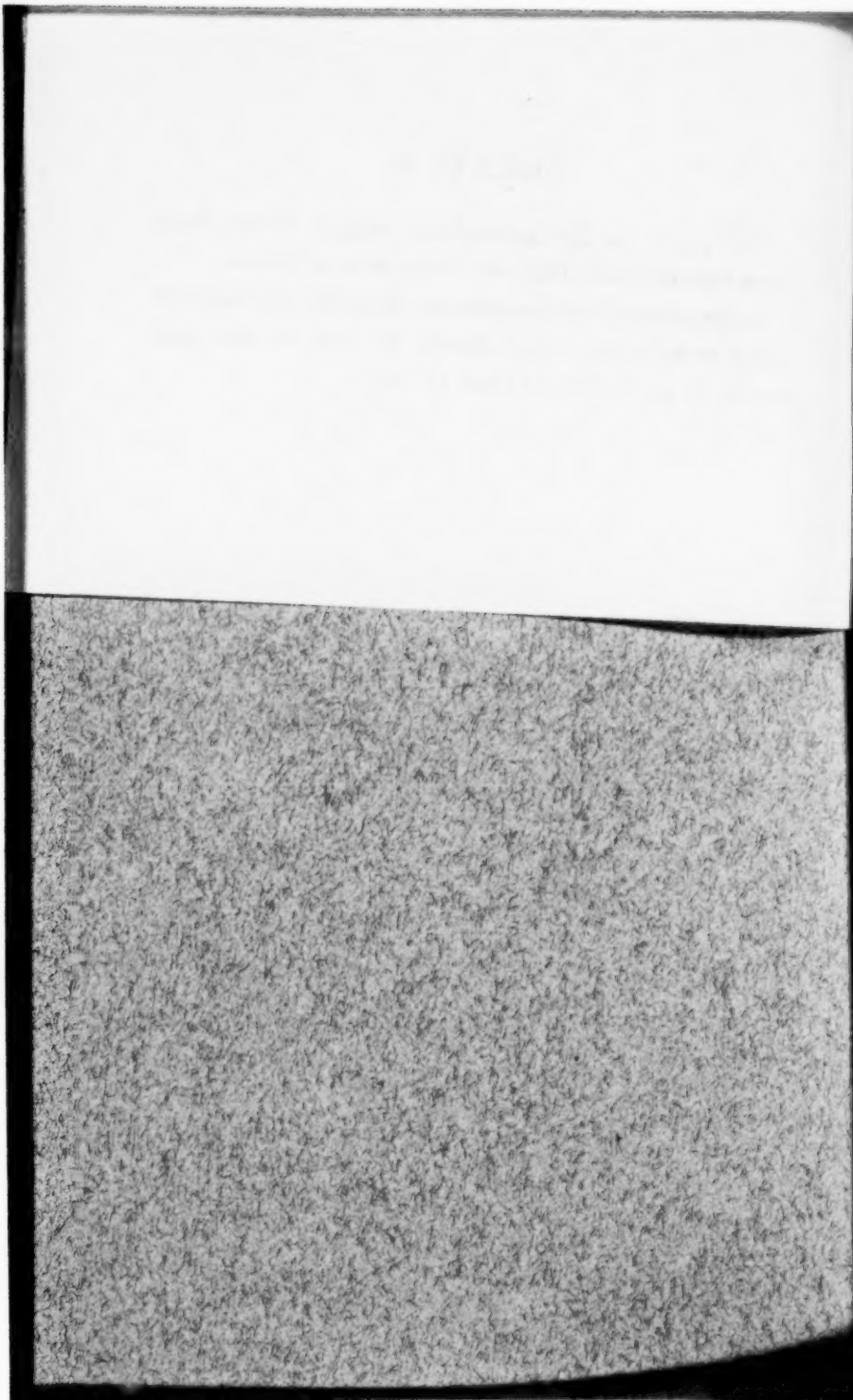
O. R. MCGUIRE,
Attorneys for Petitioners.

DELFIN JARANILLA,
Attorney General, Philippine Islands,
Of Counsel.

ERRATUM

The pages in the appendices (pages 17–40) have been renumbered since the Index was prepared.

References to the appendices, either in the Index or in the body of the Brief, should be read as one page larger (e. g., 16 should read 17, etc.).



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vs.

THE CITY OF MANILA, *Respondent*.

STATEMENT OF THE CASE

The case, with the grounds on which the jurisdiction of this Court is invoked, and the questions presented, are stated in our original petition for the writ of certiorari herein (pp. 2-14). The writ was granted June 1, 1926 (271 U. S. 658).

The Governor General having decided (R. 36, 42)

> "That the City of Manila shall pay for all services rendered by the Metropolitan Water District",

basing his decision on Section 9 of Philippine Act No. 2832, as well as "upon justice and equity",—and the Insular Auditor having arrived at the same decision upon presentation of the question to him on the initiative of the Water District,—the proper executive officers of the Insular Government, viz., the Insular Collector, Auditor, and Treas-

urer, defendants below, petitioners here, proceeded to take the proper steps to enforce that decision and thus to enforce settlement of the account between the two governmental bodies involved. Thereupon the City began these mandamus proceedings in the Insular Supreme Court, invoking the original jurisdiction of that court.

Applicable statutes are printed in the Appendix to this brief (*infra*, pp. 16-39).

BRIEF FOR PETITIONERS

May it please the Court:

The petitioners rely upon their "**Brief in Support of the Petition**" appended (pp. 15-35) to their original petition for the writ of certiorari in this case.

Supplementing that brief, the petitioners desire to add only:

I.

This suit for mandamus in the Supreme Court of the Philippine Islands, while in form against these petitioners, respectively the Insular Collector of Internal Revenue, Insular Auditor, Insular Treasurer, and the Metropolitan Water District, **was and is in substance and in fact a suit against the Insular Government,** by the City of Manila.

Therefore, in this brief, the phrases "the Government", "the Insular Government", and "these petitioners" will be used interchangeably. These petitioners have no personal interest in this suit, but are merely the representatives of the Insular Government.

A.—The Metropolitan Water District, one of these petitioners, although denominated a "public corporation", is, actually, but an executive branch of the Government of the Philippine Islands (see pp. 17-18 of our original brief in support of petition for writ of certiorari).

II.

The "City of Manila" is really but another branch of the Insular Government.

The City of Manila, while called a "municipal corporation", is not a true municipal corporation in the ordinary sense; but is rather an agency or branch of the Insular Government, wholly subject to the plenary power of that Government (see pp. 16-17 of our original brief in support of petition for certiorari).

Confer, also

Vilas vs. Manila, 220 U. S. 345, 356, 362 (LURTON, J.).

IT IS A HYBRID ORGANIZATION bearing many analogies to the government of the District of Columbia (Chap. 60, Secs. 2427-2539, Philippine Administrative Code, "The City of Manila"; see pertinent sections printed in Appendix, *infra*, pp. 21-26, where we have picked out **in bold face type** some of the provisions indicating the complete control of the city by the Insular Government).

It will be noted that:

1. Thirty per cent of the city's expenses are defrayed by the Insular Government (Code, Sec. 2442; Appendix, *infra*, p. 23).

2. The mayor and the other chief officials of the city are appointed by the Governor-General and are removable by him; and removals of even minor city officials are subject to the approval of the Secretary of the Interior (Secs. 2434, 2447; Appendix, *infra*, pp. 22, 25).

3. The Governor-General fills vacancies in the Municipal Board; and may even make temporary appointments to maintain a quorum during the sickness or absence of any member (Secs. 2439, 2440; Appendix, *infra*, pp. 22-23).

4. The mayor's power of veto of ordinances is subject to supervision by the Governor General, whose decision "shall be final" (Sec. 2443; Appendix, *infra*, p. 24).

5. The mayor exercises all of his powers, "*subject to the authority and supervision of the Secretary of the Interior*" (Sec. 2434; Appendix, *infra*, p. 22); and other city powers are likewise exercised subject to the approval of the Secretary of the Interior (Sec. 2434, last paragraph, and Secs. 2436 and 2443; Appendix, *infra*, pp. 22, 23-24).

6. The Insular Auditor receives and audits the city accounts (Sec. 2450; Appendix, *infra*, p. 25); all city moneys are deposited daily in the Insular Treasury or in a Government depository; and the city treasurer must render such accounts as may be prescribed by the Insular Auditor, and perform the duties prescribed for "provincial treasurers generally" (Sec. 2480, Appendix; *infra*, p. 26); and the city's moneys are to be kept and expended by the Insular Treasurer (Sec. 2451; Appendix; *infra*, p. 25), and not by any city official.

7. The Insular Director of Education exercises the same jurisdiction in the city as elsewhere in the Islands; the Insular Director of Health has control of health and sanitary matters and inspection in the city; the Insular Health Service acts as the local board of health; and the Insular Director of Prisons receives for confinement and detention persons sentenced to imprisonment by the Municipal Court (Secs. 2454, 2456 and 2457; Appendix, *infra,* pp. 25-26).

8. The City Attorney (*"fiscal"*) and his assistants discharge their duties under the general supervision of the Insular Attorney General (Sec. 2465; Appendix, *infra,* p. 26).

That organization is not a true city government. *It is merely the agency through which the Insular Government governs that local territory.* It is, equally with the Water District—and with the provincial governments—only a branch of the central government of the Islands. Therefore, it is quite in keeping with its true character that the Legislature further provided (Code, Sec. 593; Appendix, *infra,* pp. 20-21) that for accounting purposes it shall be regarded as a province, and that the Insular Auditor (Sec. 588; Appendix, *infra,* p. 20) shall have power to authorize and enforce settlements of accounts between it and any bureau or office of the central government, or any province (such as this Water District, likewise regarded, under Section 593, as a province for such purposes).

A.—Prior to the institution of these proceedings, the Governor General had decided, upon two appeals regularly taken to him, that, as between these two administrative branches of the Insular Government, it was the legal duty of the Water District to charge and collect from the City for "all services rendered", including water furnished for extinguishing fires and for public hydrants (R. 36, 42; see, also, for the whole correspondence on the two appeals, R. 30-42). While those decisions were, in form, simply upon appeals by minority members from contrary decisions of the majority members of the District Board of the Water District; yet inasmuch as such majority of the District

Board was composed of officials of the City of Manila sitting *ex officio* in the District Board (viz, the mayor, the city engineer, and the city treasurer; R. 33, 41; and see also Sec. 3, **Act No. 2832, as amended by Act No. 3109, Appendix,** *infra,* pp. 30-31, fixing the membership of the District Board), and inasmuch also as the City's contention was fully presented to the Governor General in the correspondence on those appeals (R. 30-42, *supra*), *the Governor General did in fact decide all the questions on the merits here involved between these two administrative bodies or branches of the Insular Government.*

B.—These petitioners were therefore, in their public acts here assailed, simply carrying out the decision of the Governor General; that is to say, of the Government of the Philippine Islands; and this suit, as above stated (Point I, p. 3, *supra*), is in substance and in fact a suit by the City against the Government of which it is a part.

III.

The position of these petitioners and of the Government (except that, as hereinafter pointed out in Points VII and X—B—(3), pp. 10-12, 13-14 hereof, the Insular Auditor had ample power, in conjunction with the Collector and the Treasurer, to **enforce the settlement** in the manner adopted by him) **is ably stated in the dissenting opinion of Mr. Justice Ostrand in the Insular Supreme Court in this case** (R. 78-87) to which, without here reprinting it, the attention of this court is especially invited.

IV.

It is believed to be indisputable that **the Philippine Legislature** under the broad general legislative powers granted it by the Organic Act (Secs. 6, 7, 8, and 12; 39 Stat. 547, 548-9; Appendix, *infra*, pp. 16-17) **had and has ample power to determine as between these two governmental bodies, the City and the Water District, whether or not, as a matter of legislative policy or discretion, the City should**

be required to pay the Water District for water furnished for public purposes such as fire protection and public hydrants.

The Legislature has so decided. It has, by Section 8 of Act No. 2832, transferred the water system from the City of Manila to the control and management of the Water District and has directed that the District receive and assume all assets and liabilities including bonds issued by the City against the water system (Sec. 8, Act No. 2832, Appendix, *infra,* p. 32; and see also paragraph XIX of the City's petition for mandamus, R. 9), and has further, by Section 9 of that same Act (Appendix, *infra,* pp. 32-33), directed that

> "The Metropolitan Water District * * * *shall charge and collect a uniform rate for all services rendered,* whether to any person, corporation, firm, governmental body, *municipal entity,* religious or charitable institution." (*Italics ours.*)

There can be no escape from this language. The City of Manila is a "municipal entity" included within the Metropolitan Water District by Section One of that same Act No. 2832 (Appendix, *infra,* p. 28; and see also paragraph XVIII of the City's petition for mandamus, R. 9). *No exception is made by the Legislature in favor of the City.* Therefore, the courts can make none.

> "The Legislature having made no exception, the courts of justice can make none, as this would be legislating."
>
> *Bank vs. Dalton,* 9 How. (50 U. S.) 522, 528-9 (CATRON, J.).

A.—THIS STATUTE IS NOT VIOLATIVE OF THE TERMS OF THE CARRIEDO TRUSTS UNDER WHICH THE CITY RECEIVED FROM THE AYUNTAMIENTO DE MANILA THE PORTION OF THE WATER SYSTEM IN WHICH THE CARRIEDO FUNDS HAD BEEN INVESTED.

On the face of the allegations of the City's petition for mandamus (paragraphs XII, XIV, XVI, XVII; R. 7-8) the obligation thereunder is simply to provide and maintain an adequate water system or water supply for the inhabitants of the City of Manila.

That purpose is amply provided for by the creation of the Water District. The Insular Government cannot be bound to continue forever the precise form of municipal government in effect when the Carriedo funds were received.

> "The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties.
>
> *Vilas v. Manila, supra,* 220 U. S. 345, 362 (LURTON, J.), quoting,
> *Shapleigh v. San Angelo,* 167 U. S. 646, 654.

B.—NO PRIVATE RIGHTS ARE HERE INVOLVED.—No individual water consumer or inhabitant of Manila is complaining that the water supply has been decreased, or that the Carriedo funds are not being used in accordance with the trust upon which they were originally received.

V.

The Philippine Legislature having so enacted, it follows that THE DECISION OF THE GOVERNOR-GENERAL (R. 36, 42, *supra*) that

> "the City of Manila shall pay for all services rendered by the Metropolitan Water District. This decision is based not only upon justice and equity but upon Section 9 of Act No. 2832, which states that the Metropolitan Water District shall charge and collect a uniform rate for all services rendered, whether to any person, corporation, firm, governmental body, municipal entity, religious or charitable institution",

WAS INDUBITABLY CORRECT.

And the Auditor arrived at the same conclusion when the Water District account with the city was presented to him for settlement.

On the merits, therefore, the City owes the money in question, for this water, to the Water District.

Therefore, this suit resolves itself into a mere question of procedure, as to whether or not the responsible executive officers of the Insular Government adopted the correct procedure in arriving at an indubitably correct decision.

A.—*That the correctness of the decision itself cannot be seriously questioned* is further evidenced by the fact that neither the City nor the court below attempts to do so. Opposing counsel in their brief in this court in opposition to the petition for certiorari make no attempt to show that the City ought not to pay this money. On the contrary they evade this question of the merits, saying (City of Manila's Brief, p. 2):

> "It is unnecessary, therefore, to go into the merits of the dispute or the history of the water system of the City of Manila."

VI.

But this question of the merits lies at the basis of this whole suit and is of primary importance here.

If the decision of the auditor and of the other executive officers of the Insular Government, petitioners here (following the decision of the Governor General, R. 36, 42, *supra,* as above stated), *was correct on the merits, then* even if the courts may (whether by mandamus, certiorari, or otherwise) inquire into the basis of the quasi-judicial action of these executive officers, *that action will not be disturbed.* The courts will not do a vain or useless thing. They will not disturb correct decisions by executive officers, as between executive departments or branches of the same government, merely in order that another form of executive procedure may be followed for the purpose of arriving at the same result. The writ of mandamus is not a writ of right; but, on the contrary, is a high prerogative writ, issuing only in the sound judicial discretion of the court.

It is an equitable remedy, largely controlled by equitable principles.

The public welfare will be consulted in determining whether or not the writ should issue; and it should be re-

fused where its issue would injuriously affect the public interest.

> "Mandamus is an extraordinary legal process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, *not to direct an act which will work a public or private mischief,* or will be within the strict letter of the law, but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles."
>
> Duncan Townsite Co. v. Lane, 245 U. S., 308, 311-12 (BRANDEIS, J.).

Therefore, the quotation made on page 33 of our original brief herein (Brief in Support of Petition for Mandamus, p. 33) from the dissenting opinion of Mr. Justice Ostrand in the Insular Supreme Court (R. 84, 87) is peculiarly applicable here, particularly that sentence of Mr. Justice Ostrand's opinion (R. 84) wherein he says:

> "If this court can by mandamus deprive the Chief Executive of any of his constitutional prerogatives, the courts of first instance can do likewise. *That this will not make for efficiency in administration, but will cause confusion and in cases such as the present tend to disrupt the government accounting system can hardly be doubted."*

VII.

The procedure here followed by the Insular auditor and the other Insular executive officers was correct, and well within their authority (See Point III, pp. 21-24, of our original brief herein).

A.—Section 24 of the Organic Act (Appendix, *infra,* pp. 18-19) imposes upon the auditor the duty to "examine, audit and *settle*" all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government *and of the provincial and municipal governments* of the Philippines, and provides that

> "the administrative jurisdiction of the auditor over accounts whether of funds or property * * * shall be *exclusive*"; and that his decision shall be "final and

conclusive upon the executive branches of the government", except for the appeal to the Governor General and the Secretary of War under Section 25 of the Organic Act.

And Section 588 of the Philippine Administrative Code of 1917, as amended by Act No. 3066 in 1923 (Appendix, *infra*, p. 20), provides further that the auditor shall have power

> "to authorize and *enforce the settlement* of accounts subsisting between the different bureaus or offices of the Insular service; between any such bureau or office and any provincial, municipal or city government; between provincial governments; between municipal or city governments; *and between any such provincial and municipal or city governments*";

and Section 593 of the same Administrative Code provides that

> "the chartered cities and the Metropolitan Water District"

shall be regarded as provinces.

Accordingly, it was the express statutory duty of the auditor, both under the Organic Act and under the statutes of the Philippine Islands (enacted by the same legislative authority which created both the City and the Water District, and controls them), to *"authorize and enforce the settlement of accounts"* subsisting between them.

The auditor, therefore, in making this settlement, performed an executive duty expressly enjoined upon him by law, necessarily involving the exercise of quasi-judicial judgment and discretion.

B.—The dispute which had thus arisen between the City and the Water District as to the amount of money due from the one to the other for water furnished or supplies rendered, necessarily related to an "account" between them. The fact that their dispute, as to how the account ought to be settled, related rather to an underlying question of the City's liability for payment of a portion of the water furnished, than to any particular items of the account, did not change the fact that it was a current account between the parties, to be "settled." (See Point II, pp. 19-20, of

our original "Brief in Support of the Petition" for certiorari herein, and the authorities there cited.)

VIII.

Since the duty to "settle" the accounts, thus imposed by law upon the Insular auditor as an executive officer of the Philippine Government, necessarily involved the exercise of quasi-judicial judgment and discretion, his discretion cannot be controlled by the courts by mandamus or other extraordinary remedy.

IX.

Even if it could be said (which is not conceded) **that** where, as here, it appears that the auditor's decision involves solely a determination of a question of law, and is not based upon the determination of questions of fact (since no particular items of the account are disputed), in such case **the writ of mandamus could be made to perform the office of a writ of certiorari to review the auditor's decision, upon allegations that it was made upon a wrong legal basis, and was in fact an abuse of his discretion; yet where it appears, as it does here, that his decision was in fact based upon a correct interpretation of the law** (Point V. *supra*) **the writ should be dismissed.**

A.—There is not even any direct allegation in the City's petition for mandamus here, that the Auditor's decision was, in fact, wrong; or that it was founded upon any wrong basis.

X.

The statutory power to "enforce the settlement" necessarily implies a grant of power to the auditor of all the incidental powers reasonably necessary for that purpose.

A.—It is fundamental that a grant of power in a constitution or statute necessarily implies and carries with it a grant of all incidental powers reasonably necessary to carry it into effect.

"Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied. It is a well established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted."

2 *Lewis' Sutherland, Statutory Construction* (Second Edition), Section 508, and cases there cited.

Confer,

Re *Neagle*, 135 U. S. 1, 58-59, 64-67 (Miller, J.).

B.—The powers exercised by the auditor in this case for the purpose of carrying into effect his statutory power and duty to "enforce the settlement" (Sec. 588 Administrative Code, as amended by Act. No. 3066 in 1923, *supra;* Appendix, *infra*, p. 20) were all well within those necessarily implied therein. They:—

(1) were only those customarily employed by auditors and comptrollers of the United States, whose powers are vested in the Insular auditor by Section 24 of the Organic Act (See Point III, pp. 21-24, of our original brief in support of the petition for writ of certiorari);

(2) did not contravene any express statutory provision either of the Organic Act or of the Philippine Legislature; since the funds affected were general allotments (that is to say, in effect, *appropriations* already made by the Legislature) to the City of Manila, not belonging to its educational fund or to any other special fund, and already allotted to it by statute; so that no further appropriation was required to take them out of the Insular Treasury and apply them to any municipal purposes, including the payment of the City's debts; and

(3) the drawing and countersigning of the appropriation warrant carrying the money from the credit balance of the City in the Insular Treasury to the credit balance of the Water District therein, was the only effective way of actually enforcing the settlement.

Anything short of that would merely have invited

further litigation or have required further legislative action. For instance, if these executive officers had stopped short, as Mr. Justice Ostrand suggests they might have done (Dissenting Opinion, R. 85) with the mere refusal of the auditor to countersign the collector's warrant in favor of the City, thus leaving the money available neither to the City nor to the Water District, it would not have been to "enforce the settlement" between these bodies as the law required the auditor to do; but would merely have been to put them in position so that both the Water District and the City would have been deprived of the funds (possibly of enough funds to cripple the Water District in the performance of its duties), and would have been required, if they could not agree among themselves, to resort to litigation or to petition the Legislature for further legislative action.

XI.

No private rights being here involved, but this being a controversy simply between two public administrative bodies, both branches (in effect at least) of the Insular Government, relating to a matter of administrative procedure, viz., the proper assignment of public funds between these two public bodies, the administrative remedy by appeal from the auditor to the Governor General and thence to the Secretary of War provided by Sections 24 and 25 of the Organic Act (39 Stat. 553-555; Appendix; *infra*, pp. 18-20) **should be exhausted before the courts interfere.** (See Point VIII, pp. 33-35, of our original brief in support of petition for a writ of certiorari herein).

It is submitted that the quotation there made (p. 35) from the opinion of this court in the *Pitcairn Coal Company* case, viz.,

> "We see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its adminis-

trative functions" (*Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Company*, 215 U. S. 481, 493; WHITE, J.), is peculiarly applicable; and *is controlling.*

XII.

No question of "due process of law" is here involved. No private rights are in issue. It is simply a question of proper procedure in allotting public funds between two public bodies, both parts of the same Insular Government.

CONCLUSION

The auditor's decision and action having been therefore

(1) correct on the merits,

(2) within the statutory powers and duties imposed upon him,

(3) properly adapted to perform his statutory duty to "enforce settlement" between these two administrative bodies of the Insular Government, and well within the powers reasonably and necessarily implied from that statutory grant of power and imposition of duty upon him; and

(4) not subject to review in the courts; at least until after the administrative remedy by appeal to the Governor General and the Secretary of War have been exhausted;

it follows that the Supreme Court of the Philippine Islands erred in entertaining jurisdiction of this suit, as well as in its decree, and that its judgment and decree should be reversed, and it should be directed to dismiss the City's petition for want of jurisdiction.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
L. H. HEDRICK,
O. R. McGUIRE,
Attorneys for Petitioners.